DECISION AND FINDINGS OF
THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBER:	247-24-000209-CU
HEARING DATE:	August 29, 2024
HEARING LOCATION:	Videoconference and Barnes & Sawyer Rooms Deschutes Services Center 1300 NW Wall Street Bend, OR 97708
APPLICANT/OWNER:	Jeff Schutte and Cindi Schutte
SUBJECT PROPERTY:	Map and Taxlot: 141102B000300 Account: 124740 Situs Address: 71510 Forest Service Rd 6360 Sisters, OR 97759
REQUEST:	The Applicant requests conditional use approval for a nonfarm dwelling in the Exclusive Farm Use (EFU) Zone and Wildlife Area (WA) Combining Zone.
HEARINGS OFFICER:	Tommy A. Brooks
SUMMARY OF DECISION:	This Decision DENIES the Application.

I. STANDARDS AND CRITERIA

Deschutes County Code (DCC)
Title 18, Deschutes County Zoning Ordinance:
Chapter 18.16, Exclusive Farm Use Zones (EFU)
Chapter 18.88, Wildlife Area Combining Zone (WA)
Title 22, Deschutes County Development Procedures Ordinance

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II. BACKGROUND AND PROCEDURAL FINDINGS

A. Request and Nature of Proceeding

This matter comes before the Hearings Officer as a request by Jeff Schutte and Cindi Schutte (together, the "Applicant") for conditional use approval of a nonfarm dwelling. The Subject Property is in the County's Exclusive Farm Use ("EFU") Zone and Wildlife Area ("WA") Combining Zone.

The Applicant provided a site plan ("Site Plan") with a (not-to-scale) depiction showing the approximate location of the proposed dwelling, a driveway, a well, a septic tank, and a septic field on the Subject Property.[1] As described by the Applicant and shown on the Site Plan, the nonfarm dwelling would be located on the southwest side of the Subject Property. Although the Site Plan purports to show a "building envelope," the depiction on the Site Plan shows the footprint of a "house" and the other facilities. Later submittals by the Applicant show the "building envelope" as a 400' by 450' rectangle on the southwest edge of the Subject Property.

The County reviews nonfarm dwellings in accordance with the standards and procedures set forth in Deschutes County Code ("DCC" or "Code") Chapter 18.16 and Title 22. The proposed use must also satisfy the standards of the WA Combining Zone – set forth in DCC Chapter 18.88.

B. Application, Notices, Hearing

The Applicant submitted the Application on April 5, 2024. On May 3, 2024, Staff of the County's Community Development Department ("Staff") provided notice to the Applicant that it did not deem the Application to be complete. The Applicant provided additional information on May 28, 2024, June 17, 2024, and July 24, 2024. As part of the July 24th submittal, the Applicant stated the application was complete at that time.

On August 5, 2024, Staff mailed a Notice of Public Hearing ("Hearing Notice"). The Hearing Notice stated the Hearing would be held on August 29, 2024.

Pursuant to the Hearing Notice, I presided over the Hearing as the Hearings Officer on August 29, 2024, opening the Hearing at 1:00 p.m. The Hearing was held in person and via videoconference, with the Hearings Officer appearing remotely. At the beginning of the Hearing, I provided an overview of the quasi-judicial process and instructed participants to direct comments to the approval criteria and standards, and to raise any issues a participant wanted to preserve for appeal if necessary. I stated I had no *ex parte* contacts to disclose or bias to declare. I invited but received no objections to the County's jurisdiction over the matter or to my participation as the Hearings Officer.

[1] The record contains various depictions of the proposed dwelling and associated facilities. For purposes of this Decision, unless otherwise indicated, the "Site Plan" refers to Exhibit B of the Applicant's Second Supplemental BOP [Burden of Proof], dated June 17, 2024.

The Hearing concluded at 1:47 p.m. I received no requests to keep the record open, so I closed the record at that time.

C. Review Period

As noted above, the Applicant submitted additional materials in response to the Incomplete Letter through July 24, 2024, stating that the Application was complete at that time. Using July 24, 2024, as the date of completeness, the deadline for a final County decision under ORS 215.427 – "the 150-day clock" – is December 21, 2024.

III. SUBSTANTIVE FINDINGS AND CONCLUSIONS

A. Staff Report

On August 20, 2024, Staff issued a report setting forth the applicable criteria and presenting evidence in the record at that time ("Staff Report").

The Staff Report did not make a final recommendation. However, the Staff Report noted that Staff believed the Applicant had not met its burden of proof or demonstrated compliance with all applicable criteria. Nevertheless, the Staff Report recommended the imposition of several conditions of approval if the Application is approved.

This Decision refers to portions of the Staff Report in reference to various evidentiary findings. Because this Decision denies the Application, however, the proposed conditions of approval in the Staff Report are not incorporated into this Decision.

B. DCC Chapter 18.16, Exclusive Farm Use Zones (EFU)

The Subject Property is within the County's EFU Zone, which is governed by DCC Chapter 18.16. This section addresses the applicable provisions of that chapter. The relevant Code language is set forth in *italics*, followed by findings addressing that language.

1. Section 18.16.030. Conditional uses permitted - High value and non-high value farmland

This Code provision lists several conditional uses permitted on all types of farmland in the EFU Zone. Among those conditional uses allowed is a nonfarm dwelling. Under this provision, such uses are expressly subject to the applicable provisions of the Comprehensive Plan, DCC 18.16.040, DCC 18.16.050, and Title 18 in general.

The Applicant proposes to establish a nonfarm dwelling on the Subject Property. The proposed dwelling is therefore allowed as a conditional use if the Applicant satisfies the applicable criteria in DCC Title 18, which are addressed throughout this Decision. As the Staff Report notes, the Applicant does not propose to establish a use other than a nonfarm dwelling, and the Applicant identifies only DCC 18.16.030(A) as the basis for that use.

2. Section 18.16.040. Limitations on Conditional Uses

A. Conditional uses permitted by DCC 18.16.030 may be established subject to ORS 215.296 and applicable provisions in DCC 18.128 and upon a finding by the Planning Director or Hearings Body that the proposed use:

1. Will not force a significant change in accepted farm or forest practices as defined in ORS 215.203(2)(c) on surrounding lands devoted to farm or forest uses; and
2. Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest uses; and

The specific limitations in DCC 18.16.040(A)(1) and (2) are required by state law and derive from ORS 215.296(1). The Land Use Board of Appeals ("LUBA") sometimes refers to these restrictions as the "farm impacts test."

An applicant carries the burden of proving that its proposal meets the farm impacts test.[2] LUBA has a well-established methodology for demonstrating compliance with the farm impacts test.[3] Under that methodology, a proposal can be approved only if it: (1) describes farm practices on surrounding lands devoted to farm use; (2) explains why the proposed development will not force a significant change in those practices; and (3) explains why the proposed development will not significantly increase the cost of those practices. To begin that process, LUBA has held that "[i]n applying ORS 215.296(1), it is entirely appropriate for the applicant and county to begin by visually surveying surrounding lands to identify the farm and forest uses to which those lands are devoted."[4] Other parties are then free to dispute the initial findings, or to add to the record additional evidence of nearby farm uses that the applicant and county must respond to.[5]

In addressing the farm impacts test, the Applicant's initial Burden of Proof statement notes that "[n]one of the parcels directly abutting the subject property are currently engaged in farm use," but that the surrounding area does include pasture and livestock farm uses. The Application goes on to provide a list of all properties within one mile of the Subject Property, also noting which properties are in farm deferral. This assessment generally amounts to a visual survey of the surrounding land, as contemplated by LUBA, and is an appropriate first step for addressing the farm impacts test.

The focus of the Applicant's discussion of the farm impacts test in its initial Burden of Proof was whether nearby farm uses and practice would impact the nonfarm dwelling, and the Applicant concludes that the "proposed nonfarm dwelling will not be subject to adverse impacts from nearby farm uses." That conclusion, however, is the reverse of what the farm impacts test requires, which is an assessment of any impacts the dwelling will have on farm practices. During the Hearing, the Applicant acknowledged this

[2] *Schrepel v. Yamhill County*, -- Or LUBA – (LUBA No. 2020-066), 2020 WL 8167220, at *6.
[3] *See, e.g., Brown v. Union County*, 32 Or LUBA 168 (1996).
[4] *Dierking v. Clackamas County*, 38 Or LUBA 106, 120-21 (2000).
[5] *Id.*

discrepancy,[6] but pointed to a letter from Long Hollow Ranch that the dwelling would not impact its operations, "including our practices", as evidence that the nonfarm dwelling would not impact farm practices. When asked if the record refers to any specific farm practices, the Applicant reiterated the existence of nearby farm uses, but did not elaborate on the presence of any farm practices associated with those uses.

As I understand LUBA's and the courts' application of the farm impacts test, satisfaction of that test must focus on impacts to farm practices rather than on compatibility with farm uses. An impact that is compatible with a farm use may nevertheless force a significant change to the farm practices associated with that use, or significantly increase the costs of those practices. Despite the Applicant's acknowledgement that there are farm uses on surrounding parcels, the record does not include a specific description of the farm practices associated with those uses. The Applicant's materials imply that such practices exist. For example, the initial Burden of Proof, where it discusses potential impacts on the dwelling, identifies potential practices in the area such as re-seeding, spraying of herbicides, use of trucks, and the application of manure. But the Applicant does not attempt to indicate which, if any, of those practices actually occur in the surrounding area.

It is possible that the proposed nonfarm dwelling can satisfy the farm impacts test. The evidentiary standard I must apply, however, is a preponderance of the evidence standard.[7] In doing so, I must determine if the evidence in the record is more likely than not to establish any fact used to satisfy a criterion. The burden to demonstrate compliance with the farm impacts test unequivocally lies with the Applicant. Without a more specific identification of the accepted farm practices that are associated with the identified farm uses on surrounding lands, I cannot make a factual finding regarding the existence of those farm practices, and therefore cannot make a finding that it is more likely than not that the proposed dwelling will not force a significant change to those farm practices. I therefore find that the Applicant has not met its burden with respect to compliance with DCC 18.16.040(A)(1) and (2).

3. That the actual site on which the use is to be located is the least suitable for the production of farm crops or livestock.

DCC 18.16.040(A)(3) is a County criterion that further limits conditional uses in the EFU Zone by requiring the use to occupy a site that is "the least suitable for the production of farm crops or livestock." As noted in the Staff Report, the Board of County Commissioners has determined that if the general unsuitability criterion of 18.16.050(G)(1)(a)(iii) is met, the least suitable criterion of Section 18.16.040(A)(3) is satisfied as well. The Applicant relies on its assertion that the area where the dwelling is proposed on the Subject Property is generally unsuitable for the production of farm crops and livestock. I address that assertion in the findings under DCC 18.16.050(G)(1)(a)(iii) below, which are incorporated herein by reference. Because those findings conclude that the Applicant has not demonstrated that the area for the nonfarm dwelling is generally unsuitable for the production of crops or grazing, I find that this Code provision is also not satisfied.

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[6] The Applicant appeared at the Hearing through legal counsel. This Decision refers to statements by the Applicant and its legal counsel as statements by the Applicant.

[7] *See Morgan v. Jackson County*, -- Or LUBA – (LUBA No. 2017-053).

3. Section 18.16.050. Standards for Dwellings in the EFU Zones

G. Nonfarm Dwelling.

1. One single-family dwelling, including a manufactured home in accordance with DCC 18.116.070, not provided in conjunction with farm use may be permitted on an existing lot or parcel subject to the following criteria:

a. The Planning Director or Hearings Body shall make findings that:

i. The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices, as defined in ORS 215.203(2)(c), or accepted forest practices on nearby lands devoted to farm or forest use.

DCC 18.16.050(G) sets forth the provisions of DCC 18.16.050 that are specific to nonfarm dwellings.[8] Subsection (1)(a)(i) restates the applicability of the farm impacts test set forth in DCC 18.16.040(A). Findings addressing that Code provision are set forth above, concluding that the Applicant has not met its burden of demonstrating compliance with the farm impacts test, and those findings are incorporated herein by this reference. Because the Applicant has not met its burden of demonstrating compliance with the farm impacts test, I find that this Code provision is not satisfied.

ii. The proposed nonfarm dwelling does not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, the county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated, by applying the standards under OAR 660-033-0130(4)(a)(D), and whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area.

DCC 18.16.050(G)(1)(a)(ii) requires an analysis of the overall land use pattern of the area before and after the placement of the nonfarm dwelling. The Applicant must show that the nonfarm dwelling will not materially alter the existing pattern, and the Code requires the County to consider the cumulative impact of nonfarm dwellings.

Like the farm impacts test, this provision implements state law, and the Land Conservation and Development Commission ("LCDC") has adopted specific administrative rules for implementing this criterion.[9] In brief summary, those rules require the County to: (1) consider a study area of at least 2,000 acres; identify the types of farm uses in that area and dwelling development trends since 1993; (3) determine the potential number of nonfarm dwellings or lot of record dwellings that could be approved in

[8] The lead-in language of this Code provision requires the owner of the subject property to record a covenant agreeing not to pursue claims for relief for injuries from certain farm and forest practices. Because this Decision denies the Application, I find it is not necessary to address that requirement.
[9] OAR 660-033-0130(4)(a)(D).

the study area; and (4) determine whether additional dwellings will materially alter the land use pattern by making "it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area."

The Applicant addressed these requirements first by identifying a study area with a one-mile radius, which is consistent with prior County practice and with the LCDC's rule requiring a minimum area of 2,000 acres. As noted above, the Applicant also identified the broad types of farm uses in the study area – noting that they consist of general farming with irrigated pasture and livestock.

According to the Applicant, 19 of the 22 tax lots in the study area are privately owned, and 9 of those have dwellings on them. Those dwellings have all been constructed since 1993 and are also nonfarm dwellings. The Applicant estimates that an additional nine nonfarm dwellings are possible in the study area. The Applicant asserts that it is not possible to determine the number of lot of record dwellings that are possible, because such an analysis is site-specific and complex, but notes that it is difficult to site such dwellings and no such dwellings currently exist in the area.

Based on those facts, the Applicant asserts that the stability of the land use pattern will not be materially altered. According to the Applicant, all of the parcels currently in farm use in the study area "will remain relatively stable and that there will be little or no expansion of farm use in the area, given the topography and availability of water rights." The Applicant also asserts that farm use in the area has remained stable for a number of years."

Participant Central Oregon LandWatch ("COLW") disagrees with the Applicant and asserts that the stability of the land use pattern has already been altered due to nonfarm dwellings in this area, and that the proposed dwelling will do the same. In support of its assertion, COLW provided aerial images showing surrounding grazing areas and compared those to the images showing increased nonfarm development over time. COLW concludes "[a]pproval of this nonfarm dwelling will irreversibly tip the scales of this area land use pattern's stability, and will soon no longer be suitable for commercial grazing."

The Applicant appears to be correct that existing farming will be able to continue (e.g. because the Subject Property is not currently farmed, current farms can continue their operation). This Code provision, however, requires an analysis of the cumulative impact of nonfarm dwellings, not just the impact of the proposed dwelling. While a close call, I agree with COLW that, under these circumstances, the proposed nonfarm dwelling, when viewed cumulatively with other nonfarm dwellings, will materially alter the stability of the land use pattern. In arriving at that conclusion, I specifically note the difference in the conditions that currently exist when compared to the conditions that existed in 2014. In 2014, through Casefile 247-CU145, the County approved a nonfarm dwelling on the Subject Property. If constructed at that time, the dwelling would have been the seventh nonfarm dwelling constructed in the study area. In that scenario, it is understandable that the County would have determined that 7 out of 19 privately-owned lots could be converted to nonfarm uses without altering the overall land use pattern. As the Applicant notes, however, this Application would now result in 10 of the 19 privately-owned lots being developed with nonfarm dwellings. In other words, if approved, the majority of the privately owned lots in the study area would be developed for nonfarm purposes. Thus, contrary to the Applicant's assertion, this does "tip

the scales" in favor of nonfarm dwellings over farm uses, thereby creating a new pattern of development and, therefore, materially altering the existing pattern going forward.

Based on the foregoing, I find that the Application does not satisfy the requirements of DCC 18.16.050(G)(1)(a)(ii).

> *iii. The proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock, or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.*

DCC 18.16.050(G)(1)(a)(iii) requires the Applicant to site a nonfarm dwelling on a parcel, or portion of a parcel, that is generally unsuitable for the production of farm crops, livestock, or merchantable tree species. DCC 18.16.050(G)(2)(b) specifies that a lot or parcel or portion of a lot or parcel is presumed suitable for the production of farm crops and livestock if it is predominately composed of Class I-VI soils.

There is no dispute in this proceeding that the Subject Property cannot support merchantable tree species.

The Application initially states that the Subject Property consists of Class IV soils. The Applicant's initial Burden of Proof expands on the description, noting that the Natural Resources Conservation Service ("NRCS") identifies two soil types on the Subject Property – 3B Agency Madras complex, and 86A Madras sandy loam – which are both Class IV soils when not irrigated. The submittal states that the dwelling will be on a portion of the Subject Property with the 3B classification. Based on this initial information, the entirety of the Subject Property is presumed to be suitable for farming.

In a subsequent submittal, the Applicant submits and relies on an Order 1 Soil Study ("Soil Study") to more particularly determine the soil classification of the Subject Property. According to the Soil Study, a portion of the Subject Property has Class VII soils. The Applicant prepared a "Soil Map" based on the Soil Study, and the Applicant states this figure "shows the location of the proposed building envelope in relation to the Class IV soils," noting that it will be "located entirely outside of the Class IV soils and entirely within Class VII soils."

Participant COLW objects to the Applicant's reliance on the Soil Study and asks that it be stricken from the record. According to COLW, OAR 660-033-0030(5)(d) prohibits the use of an Order 1 soil study to reclassify agricultural land if the study is filed after October 1, 2011. The Applicant's Soil Study is from 2009. While COLW is correct the LCDC's rules do place limits on the use of older soil studies, I find that the specific limit COLW identifies is not applicable. OAR 660-033-0030(5)(c) states that this rule applies in two circumstances: (1) a change in designation of a parcel from an EFU zone to a non-resources plan designation and zone; and (2) "any other proposed land use decision in which more detailed data is used to demonstrate that a lot or parcel planned and zoned for exclusive farm use does not meet the definition of agricultural land."

Here, the Applicant is not seeking to redesignate the Subject Property to a non-resource plan designation or zone, and the land use decision the Applicant seeks, a conditional use permit for a nonfarm dwelling,

is not based on an argument that the Subject Property is not "agricultural land." Instead, the Application materials appear to accept the fact that the Subject Property is still "agricultural land," but the Applicant asserts that the portion of the Subject Property on which the dwelling will sit is generally unsuitable for the production of farm crops and livestock, or merchantable tree species. The Applicant is welcome to use the Soil Study to support that conclusion, and I decline to strike that portion of the Applicant's submittal from the record.

LCDC's rules nevertheless establish the factors that must be considered when determining if a parcel of land, or a portion therefore, is generally unsuitable for the production of farm crops and livestock. Specifically, OAR 660-033-0130(4)(c)(B)(ii) states that a parcel is not generally unsuitable "simply because it is too small to be farmed profitably by itself. If a lot or parcel or portion of a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, then the lot or parcel or portion of the lot or parcel is not 'generally unsuitable'." On this point, I find that the Applicant has not met its burden.

The Applicant relies on several facts, primarily: (1) that the Subject Property is not currently farmed; (2) the soil conditions in the location where the dwelling is proposed are poor; and (3) the property cannot support enough forage to economically raise cattle. Although each of these facts may be true, they are property-specific and do not address whether the Subject Property could be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch encompassing other properties. Indeed, the record indicates that other properties in the surrounding area are subject to grazing leases, and also indicates that the Subject Property is similar in character to those properties that are not already developed with dwellings. In other words, the soil classification of the Subject Property alone is not determinative. In the absence of a more detailed comparison of the Subject Property with those other properties in the surrounding area that are currently used for grazing, I find that I cannot conclude, based on a preponderance of the evidence, that the property the Applicant seeks to use is generally unsuitable for that purpose. It may very well be that the Applicant can make such a showing, but that burden falls to the Applicant, and the current record does not satisfy that burden.[10]

Based on the foregoing, I find that the Applicant has not met its burden of demonstrating compliance with DCC 18.16.050(G)(1)(a)(iii).

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[10] The Applicant notes that an earlier County decision concluded that the Subject Property is generally unsuitable for the production of farm crops and livestock, and that the earlier decision was "not in error." The Applicant, however, does not assert or otherwise argue that the Hearings Officer is bound by that decision, which addressed a different property configuration, which the Applicant did not act upon, and which has since expired by its terms.

iv. The proposed nonfarm dwelling is not within one-quarter mile of a dairy farm, feed lot or sales yard, unless adequate provisions are made and approved by the Planning Director or Hearings Body for a buffer between such uses. The establishment of a buffer shall be designed based upon consideration of such factors as prevailing winds, drainage, expansion potential of affected agricultural uses, open space and any other factor that may affect the livability of the nonfarm dwelling or the agriculture of the area.

The Applicant asserts, and the Staff Report agrees, that the Subject Property is not within one-quarter mile of a dairy farm, feed lot, or sales yard. No participant in this proceeding counters that assertion. Based on the foregoing, I find that the Application complies with DCC 18.16.050(G)(1)(a)(iv).

v. Road access, fire and police services and utility systems (i.e. electrical and telephone) are adequate for the use.

I find that the Applicant has established the adequacy of police services and utility systems. As acknowledged by the Staff Report, the Deschutes County Sheriff provides police services. The Applicant has documented the availability of utility services from third party providers, such as electric and telephone service, and the Applicant proposes to obtain water from an onsite well. No participant has disputed the adequacy of these service.

Road access to the Subject Property is provided via Forest Service Road No. 6360, which the Staff Report notes connects to Holmes Road, a County road. The Applicant provided evidence of a grant of right-of-way access from the Bureau of Land Management ("BLM"), which has been assigned to the Applicant, allowing use of Road No. 6360. The Applicant asserts that this road is adequate for accessing the dwelling. Although COLW takes issue with the reliance on the use of that road, COLW's argument is presented in the context of a different Code criterion (location of the proposed building envelope as it relates to this road), and COLW does not appear to dispute the adequacy of the road access itself. I note that the BLM grant of access it not perpetual, and the Applicant will need to renew that access when it terminates. However, the Code does not appear to impose any temporal component to the adequacy of road access. Thus, while the Applicant bears the risk that the road access is not perpetual, I find that, as proposed, the Applicant has demonstrated that road access is adequate for purposes of this Code provision.

With respect to fire services, the Applicant notes that the Subject Property it not within a rural fire protection district, but it is a part of the Lower Bridge Rural Fire Protection Association. The Applicant indicates that it has requested to be annexed into the Cloverdale Rural Fire Protection District, but the record indicates that annexation has not occurred, that the District has no plans to annex the Subject Property, and that the Applicant does not otherwise have a contract for services with the District. In response, the Applicant proposes a condition of approval requiring certain firebreaks to be deployed and the use of a residential fire sprinkler system, along with onsite water storage capacity of at least 4,000 gallons. COLW objects to the use of these conditions, asserting that actual service by the rural fire district is required, and disputing the adequacy of the fire breaks the Applicant has proposed.

The Applicant has proposed the conditions of approval relating to fire service based on the use of similar conditions of approval used for other nearby nonfarm dwellings. While I agree with the Applicant that these conditions are likely adequate, and I disagree with COLW that the Subject Property must take service from a rural fire protection district to satisfy this criterion, this Decision ultimately denies the Application. There is therefore no basis to impose any conditions of approval in this regard.

> *vi. The nonfarm dwelling shall be located on a lot or parcel created prior to January 1, 1993, or was created or is being created as a nonfarm parcel under the land division standards in DCC 18.16.055(B) or (C).*

The Staff Report states that the Subject Property was created in 2009 as a nonfarm parcel under the County's land division standards and, specifically, pursuant to DCC 18.16.055(B). COLW, however, asserts that there is no evidence that the 2009 land division was completed, and notes that the partition approved in that matter was never recorded. The Applicant does not respond to COLW's argument. Instead, the materials provided by the Applicant indicate that the Subject Property was created by deed in 1941. I find that it is not necessary to resolve this issue, as, under either scenario, this criterion is satisfied. Either the parcel was created in 1941 by deed, or it was created through the County's land division procedures.

4. Dimensional Standard in the EFU Zone

DCC 18.16.060 through DCC 18.16.080 contain various dimensional standards applicable to the development of structures in the EFU Zone, such as height limits and yard or stream setbacks. Because this Decision denies the application, I find that it is not necessary to address these dimensional standards, which can generally be satisfied through the imposition of conditions of approval to the extent they are applicable.

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C. DCC Chapter 18.88, Wildlife Area Combining Zone

The Subject Property is in the WA Zone. The following findings address the applicable provisions of that zone.

1. DCC 18.88.040, Uses Permitted Conditionally

> *A. Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the conditional uses permitted shall be those permitted conditionally by the underlying zone subject to the provisions of the Comprehensive Plan, DCC 18.128 and other applicable sections of this title. To minimize impacts to wildlife habitat, the County may include conditions of approval limiting the duration, frequency, seasonality, and total number of all outdoor assemblies occurring in the WA Zone, whether or not such outdoor assemblies are public or private, secular or religious..*

DCC 18.88.040(A) allows as conditional uses any use that is conditionally permitted in the underlying zone, unless limited by DCC 18.88.040(B). The uses limited by that latter Code provision do not include nonfarm dwellings. Thus, as long as the proposed nonfarm dwelling satisfies the criteria of the underlying EFU zone, it can be permitted conditionally in the WA zone, if all other WA zone criteria are satisfied.

As set forth above in the portion of these Findings addressing the EFU Zone, the Applicant has not demonstrated compliance with all EFU Zone provisions. Thus, although a nonfarm dwelling is allowed in the WA Zone, I find that the Application does not satisfy DCC 18.88.040(A).

B. Siting and Dimensional Standards in the WA Zone

DCC 18.88.060 and DCC 18.88.070 contain various siting and dimensional standards applicable to the development of structures in the WA Zone. Because the Decision denies the application, I find that it is not necessary to address these siting and dimensional standards, which can generally be satisfied through the imposition of conditions of approval to the extent they are applicable.

Notwithstanding the foregoing, because the participants in this proceeding have different positions with respect to DCC 18.88.060(B) and (C), I address those Code provisions. The approval standards encompassed in those Code provisions require the Applicant to demonstrate that the footprint of the dwelling will be located entirely within 300 feet of public roads, private roads, or recorded easements for vehicular access existing as of August 5, 1992. To meet this standard, the Applicant initially asserted that the proposed dwelling is within 300 feet of FS Road 6360. According to the Site Plan, however, FS Road 6360 is at least 500 feet from the building envelope as depicted on that figure, and therefore well over 300 feet from the proposed dwelling footprint.

The Applicant later asserted that it is relying on an existing spur road that runs east to west from FS Road 6360 along the southern edge of the Subject Property ("Spur Road") to meet this standard. The Applicant's Site Plan indicates that the proposed dwelling footprint is 229 feet from the Spur Road. Because the Site Plan does not include a scale, it is not possible to confirm that distance by measuring the building footprint

or road, but the Site Plan includes narrative text that describes the distance. Even so, that text appears to describe the closest point of the dwelling footprint, whereas this Code provision requires that the entire footprint be within 300 feet of the road. The Site Plan does not clearly identify that 300-foot distance. I therefore find that this criterion can only be met with a condition of approval to ensure the correct distance is adhered to if the Spur Road can be used as the basis for the measurement.

COLW disagrees with the Applicant's reliance on the Spur Road, noting that DCC 18.88.060(C) contains an evidentiary requirement for purposes of DCC 18.88.060(B). Specifically, subsection (C) states that a private road, easement, or driveway will conclusively be regarded as having existed prior to August 5, 1992, if the applicant submits a recorded easement, an aerial photograph "with proof that it was taken prior to August 5, 1992", or a published map showing the road. Because the aerial photographs the Applicant submitted are not dated, COLW argues they cannot be relied upon to meet this criterion.

The evidentiary requirement COLW cites applies only to a "private road", easement, or driveway; it does not purport to apply to public roads. As described by the Applicant, the Spur Road is part of FS Road 6360, and the Applicant does not rely on that road being a private road, easement, or driveway. Further, even if certain evidentiary proof is "conclusive" that the road existed as of the required date, DCC 18.88.060(C)(2) states that the Applicant can provide other evidence to establish the existence of the road. In addition to aerial photographs, the Applicant also submitted evidence in the form of the County's prior decisions, which refer to the existence of the Spur Road going back to at least 1980. Although the Applicant's evidence is not the kind of evidence the Code treats as "conclusive", it is evidence nonetheless. In the absence of any persuasive evidence undermining the Applicant's evidence, I find that that Applicant has satisfied its burden of showing the proposed dwelling can be located with 300 feet of that road as required by this Code provision. Again, a condition of approval would be necessary to ensure compliance with that dimensional standard, but this Decision does not approve the Application and, therefore, such a condition is not warranted or imposed.

IV. CONCLUSION

Based on the foregoing, I find that the Applicant has not met its burden of demonstrating compliance with all approval criteria necessary to establish a nonfarm dwelling in the EFU Zone. The Application is therefore DENIED.

Dated this 1st day of October 2024.

Tommy A. Brooks
Deschutes County Hearings Officer